

Service Date: December 6, 1982

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Complaint Of)	UTILITY DIVISION
THE STATE OF MONTANA, DEPART-)	
MENT OF INSTITUTIONS Against THE)	DOCKET NO. 82.10.64
MONTANA POWER COMPANY.)	ORDER NO. 4952

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FINAL ORDER

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APPEARANCES

FOR THE DEPARTMENT OF INSTITUTIONS:

Nick A. Rotering, Special Assistant Attorney General, 1539 11th Avenue, Helena, Montana 59620

FOR THE MONTANA POWER COMPANY:

Robert P. Gannon, Legal Department, Montana Power Company, 40 East Broadway, Butte, Montana 59701

BEFORE

Calvin K. Simshaw, Staff Counsel & Hearing Examiner

BACKGROUND

1. On October 12, 1982, the Montana Public Service Commission docketed a formal complaint by the Department of Institutions on behalf of the Boulder River School and Hospital against the Montana Power Company. The basis for the complaint is outlined in the Department's letter to the Commission dated August 12, 1982. The Montana Power Company (hereinafter "MPC") responded to the Complaint by way of letter to the Commission dated September 3, 1982.

2. A review of the Complaint and Response reveals the following. MPC provides electric service to the Boulder River School and Hospital (hereinafter "School"). MPC alleges that in June of 1974 there was a current transformer malfunction on the main electric meter at the School. The malfunction was not discovered and repaired until September of 1980. MPC maintained that the meter malfunction resulted in a failure to register and bill \$43,767.86 in energy charges between June, 1974 and September, 1980. The Department of Institutions (hereinafter "Department") challenged the calculation of the back charges and maintained that it should not be liable for the same.

3. A public hearing was scheduled for November 12, 1982 to consider the matter. The parties were requested to file and did file prehearing briefs addressing the issue of applicable statutes of limitations.

4. Following a notice of rescheduling, the hearing actually took place on November 16, 1982, with Calvin K. Simshaw, Commission staff attorney acting as hearing examiner. Both parties have filed written waivers of their rights under MCA § 2-4-621, concerning issuance of a proposed order when the case is heard by a hearings examiner.

TESTIMONY OF MPC

5. MPC presented the testimony of three witnesses. Mr. Mark Scarff is an electrical engineer for MPC. He presented a general description of the function and operation of electric meters such as those in operation at the School. Mr. Scarff's description included an explanation of the interrelationship of the current and potential transformers.

6. Mr. Tom Lingenfelter is an electric meter foreman for MPC. Mr. Lingenfelter sponsored MPC Exhibit No. 1 consisting of meter cards which provide a record of installation testing and maintenance of the old and new meters at the School. Mr. Lingenfelter described how he came to conduct a routine field test on the meter at the School in July of 1980. In his test he registered 120 volts out of one potential transformer but zero volts out of the other. This indicated a major malfunction of the meter resulting in a significant under registration of the power that was actually being received by the school.

7. Mr. Lingenfelter's further examination revealed that some of the wires had been burned and blackened. It was Mr. Lingenfelter's opinion that the damage had likely been caused by a lightening strike.

8. Mr. Tim McKeon is the Helena Division Community Relations Coordinator for MPC. Mr. McKeon sponsored MPC Exhibit Nos. 4, 5, 6 and 7 which contain detailed consumption and billing records for the School for the period January 20, 1973 through September 1, 1982. MPC Exhibit No. 7 contains the primary support for Mr. McKeon's conclusion that the meter at the School began to malfunction in June of 1974:

BOULDER RIVER SCHOOL

	<u>Per Day</u>	<u>Per Month</u>
1/20/73 - 12/20/73	6,399	437
1/20/74 - 6/19/74	5,914	409
* 6/19/74 - 1/17/75	3,579	247
1/17/75 - 12/23/75	3,706	248
12/23/75 - 12/1/76	3,740	246
12/1/76 - 12/1/77	3,659	237
12/1/77 - 12/1/78	3,539	250
12/1/78 - 12/1/79	3,624	253
12/1/79 - 9/1/80	3,441	244
9/1/80 - 9/1/81	4,840	369
9/1/81 - 9/1/82	4,874	369

* Does not include KW demand of 6/19/74 - 7/22/74. This is an accurate demand read.

9. Mr. McKeon reasoned that the significant drop in registered consumption and demand beginning in June, 1974 and the significant increase in registered consumption and demand beginning in September, 1980 evidence the fact that the meter first malfunctioned in June, 1974 and continued to malfunction until it was replaced in September, 1980. Mr. McKeon submitted that there was no other explanation for the significant shifts in the data.

10. Mr. McKeon explained that the amount of unregistered power for the purposes of backbilling was calculated as follows. The Company first took one year's accurate billing data after the faulty meter was replaced, i.e. 9/15/80 through 9/14/81 (MPC Exhibit No. 4). The Company then

determined that the average consumption based upon the accurate data was 4,840 kwh per day and 369 kw per month. These average figures were then imputed back to the period during which the meter was malfunctioning. To the extent that the amount registered by the faulty meter was less than the average amounts based on the accurate data, the School was billed for the difference.

11. MPC Exhibit No. 6 indicates that the backbilling would be \$20,932.18 if one was to only go back as far as five years from the date of the hearing, i.e. consumption from November 1, 1977 to August 31, 1980.

TESTIMONY OF THE SCHOOL

12. Mr. Richard Heard, Superintendent of the Boulder River School and Hospital testified on behalf of the Department. Mr. Heard explained that the School implemented an intensive energy conservation effort in the Fall of 1973. He also pointed out that the population at the School declined from 563 to 239 during the period that the meter is alleged to have been malfunctioning. At least three buildings were vacated and demolished also during that period.

13. However, Mr. Heard could not identify any specific causal factor that would have resulted in the abrupt decrease in consumption during June of 1974 as evidenced in MPC Exhibit No. 7.

DISCUSSION, ANALYSIS AND FINDINGS

14. It is clear as a general proposition that utility customers are liable for charges related to usage that is not registered due to metering malfunction if the amount of that usage can be reasonably quantified. Section 69-3-305, MCA, Montana Public Service Commission Electric Service Regulations Rule 5-8, Northern States Power Company v. Lyon Food Products, Inc., 229 NW 2d 521 (Minn. 1975); Illinois Power Company v. Champaign Asphalt Co., 310 NE 2d 463 (App. Court of Illinois, 1974).

15. More specifically, Rule 9-9 of the Commission's Electric Service Regulations provides:

9.9 Adjustment for Inaccurate Meter Registration--

Whenever a tested meter in service is found to be fast or slow beyond the limit of accepted accuracy as defined in Rule 9-8, utility shall make an adjustment, based on the corrected registration for the period in which the meter was registering incorrectly, if such period is known, and if not known for a period of not exceeding six months, but in no event for a period longer than present customer's occupancy. Whenever any bill or bills have been adjusted or corrected as provided above and whenever such adjustment amounts to \$1.00 or more, utility shall refund to customer any amount found to have been collected in excess of the proper amount, or utility may require customer to pay any additional amount due, as the case may be.

16. The record in this case clearly indicates that the old meter at the School was malfunctioning at the time it was tested and replaced. However, the Department maintains that the duration of the malfunction is not known. The Commission disagrees.

17. MPC Exhibit No. 7 evidences an abrupt decrease in consumption beginning June of 1974. Although the Department has cited ongoing conservation programs and decreases in population which would tend to reduce consumption; these factors are gradual in character. They cannot account for the abruptness of the decrease in consumption. The pattern of the registered demand is particularly revealing. The demand had registered over 400 kw in 13 of the previous 16 billing periods and was never below 360 kw prior to June, 1974. It suddenly dipped to a reading of 240 kw for the billing period 7/22/74 to 8/21/74 and remained below 300 kw until the meter was replaced in September, 1980. (MPC Exhibit No. 5)

18. In fact, the shift in consumption in June, 1974 is even more abrupt than the shift that occurred in September, 1980, when the faulty meter was replaced with an accurate one.

19. The Commission finds that the evidence in the record is sufficient to establish that the meter began malfunctioning during the first few days of the 6/19/74 to 7/22/74 billing period; the shift in energy having occurred primarily in that billing period while the shift in demand did not occur until the subsequent billing period.

20. Having determined that the period of the malfunction is known, the remaining question is how far back should the Company be allowed to go in backbilling for the undercharge. The Department maintained in its prehearing brief that the statute of limitations contained in Section 27-2-211(1)(c), MCA, should be applied in this instance. That section provides for a two year limitation as follows:

27-2-211. Actions to enforce penalty or forfeiture or other statutory liability. (1) Within 2 years is the period prescribed for the commencement of an action upon:

...

- (c) a liability created by statute other than:
 - (i) a penalty or forfeiture; or
 - (ii) a statutory debt created by the payment of public assistance.

21. The Commission finds that it would not be proper to apply the limitation contained in Section 27-2-211(1)(c), MCA, to this case. The Department has not cited the Commission to any statutory provision which creates the liability to pay utility charges.

22. MPC in establishing the liability at \$43,757.86 originally maintained that the School was liable for charges for the entire period. In its pre-hearing brief MPC relied upon Section 27-2-202, MCA, as establishing the applicable period of limitations. It provides:

27-2-202. Actions based on contract or other obligation.

(1) The period prescribed for the commencement of an action upon any contract, obligation, or liability founded upon an instrument in writing is within 8 years.

(2) The period prescribed for the commencement of an action upon a contract, account, or promise not founded on an instrument in writing is within 5 years.

(3) The period prescribed for the commencement of an action upon an obligation or liability, other than a contract, account, or promise, not founded upon an instrument in writing is within 3 years.

MPC was not able to locate a written contract with the School. Therefore, in its brief MPC maintained that Section 27-2-202(2), MCA, established the proper limitation at five years.

23. MPC further clarified its position at the hearing in calculating a new liability amount of \$20,932.18 by going back five years from the date of filing an action in district court to recover the liability (November 15, 1982).

24. As the School's liability to pay for services rendered does appear to be contract in nature, the Commission concludes that the five year limitation in 27-2-202(2), MCA, is the proper limitation in this case. The Commission further concludes that \$20,932.18 is the amount that the School should remain liable for. That number is arrived at on an appropriately conservative basis. It takes into account decreased consumption due to declining population and conservation measures as if the total decline and conservation were in place at the time the malfunction occurred.

25. The Commission finds that the School is liable to MPC for electric service in the amount of \$20,932.18. This ruling has the affect of making the School liable for unregistered consumption for a 34 month period from 11/1/77 to 8/31/80.

26. Recognizing the hardship that such a late-discovered liability has on the School, the Commission finds it appropriate that the liability be paid in 34 equal monthly payments.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and subject matter of this docket pursuant to Title 69, Chapter 3, MCA.

2. It is clear as a general proposition that utility customers are liable for charges related to usage that is not registered due to metering malfunction if the amount of that usage can be reasonably quantified. Section 69-3-305, MCA, Montana Public Service Commission Electric Service Regulations Rule 5-8, Northern States Power Company v. Lyon Food Products, Inc., 229 NW 2d 521 (Minn. 1975); Illinois Power Company v. Champaign Asphalt Co., 310 NE 2d 463 (App. Court of Illinois, 1974).

3. Section 27-2-202(2), MCA, establishes the appropriate period of limitations to be applied in this case.

4. Liability in the amount of \$20,932.18 is a reasonable determination of the amount of electric service that was under billed due to meter malfunction during the appropriate period in this case.

ORDER

THE MONTANA PUBLIC SERVICE COMMISSION ORDERS THAT:

1. The Boulder River School and Hospital is liable to Montana Power Company in the amount of \$20,932.18 for service provided during the period from November 1, 1977 to August 31, 1980.

2. The liability should be paid in 34 equal monthly payments.

DONE AND DATED this 6th day of December, 1982 by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION.

GORDON E. BOLLINGER, Chairman

JOHN B. DRISCOLL, Commissioner

HOWARD L. ELLIS, Commissioner

CLYDE JARVIS, Commissioner

THOMAS J. SCHNEIDER, Commissioner

ATTEST:

Madeline L. Cottrill
Commission Secretary

(SEAL)

NOTE: You may be entitled to judicial review of the final decision in this matter. If no Motion for Reconsideration is filed, judicial review may be obtained by filing a petition for review within thirty (30) days from the service of this order. If a Motion for Reconsideration is filed, a Commission order is final for purpose of appeal upon the entry of a ruling on that motion, or upon the passage of ten (10) days following the filing of that motion. cf. the Montana Administrative Procedure Act, esp. Sec. 2-4-702, MCA; and Commission Rules of Practice and Procedure, esp. 38.2.4806 ARM.